155-663

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RECORD, CASE No. 14,491.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., ~~289~~. 92

JOSEPH S. BROWN, APPELLANT,

vs.

B. D. SPILMAN AND W. N. CHANCELLOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED FEBRUARY 24, 1891.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in said district, on the 9th day of July, A. D. 1890, the following order was made and entered of record, to wit:

B. D. SPILMAN and W. N. CHANCELLOR
vs.
JOSEPH S. BROWN. } In Equity.

On this 8th day of July, 1890, the above-named plaintiffs, by counsel, presented their bill of complaint, and alleging that they are the owners in fee simple of a tract of forty acres of land, more or less, lying in the county of Pleasants, State of West Virginia; and also alleging that the defendant, his agents, servants, and attorneys, have set up and asserted some claim to ten acres of said land, whereby they cast a cloud upon the legal title of the plaintiffs to said ten acres of land, and praying an injunction to restrain the defendant, his agents, attorneys, and all other persons acting under him or them, from instituting or prosecuting any suits or actions in any court of law or equity against the plaintiffs, their agents or servants, in respect to said ten acres of land or any part thereof, and from interrupting or annoying, by injunction or otherwise, their development and improvement of said ten acres.

On consideration whereof the said bill is ordered to be filed and leave is given the plaintiffs to sue out process thereon, and the first day of September, 1890, is fixed for the hearing of the application for said injunction, as prayed for in said bill, and in the meantime the said defendant, his agents and servants, are hereby restrained and enjoined from entering into or upon said ten acres in the bill mentioned, and from instituting or prosecuting any action or suits at law or equity upon the said pretended right or claim of the defendant, and from in anywise vexing, annoying, or interrupt-
2 ing the plaintiffs, their agents or servants, in their development and improvement of said ten acres until the hearing of said application by this court and until the further order of this court.

And a copy of this order being served upon the defendant, his agents or attorneys, shall be equivalent to service by notice of the time and place for said application.

And on the same date, to wit, on the 9th day of July, A. D. 1890, the following bill and exhibits were filed:

In the Circuit Court of the United States for the District of West Virginia.

To the honorable judges of said court:

The bill of complaint of B. D. Spilman and W. N. Chancellor, who are citizens of the State of West Virginia, filed in said circuit court against Joseph S. Brown, who is a citizen of the State of Pennsylvania.

And thereupon the plaintiffs say that they are the owners in fee simple of a tract of forty acres of land, more or less, lying and being in the county of Pleasants, on the Ohio river and French creek, in West Virginia, which was conveyed to them by John F. Taylor and wife by deed bearing date the 30th day of June, 1890, a copy of which deed is filed herewith, marked Exhibit "A," and prayed to be taken and read as part of this bill.

The plaintiffs further say that said tract of forty acres of land is subject to a lease embracing thirty acres of said land, made by John F. Taylor in July, 1889, for oil purposes, and that the residue, ten acres of land, is not embraced by said lease, but is free and unencumbered, and is owned by the plaintiffs in fee simple, and was so held by said John F. Taylor at the time he conveyed the same to the plaintiffs as aforesaid; that said ten acres is described
3 and bounded as set forth in said lease, a copy of which is filed herewith, marked as Exhibit "B," as part of this bill.

The plaintiffs further say that the said ten acres so described in said lease and so held by them in fee simple is valuable chiefly, if not entirely, on account of the valuable oil and minerals underlying its surface, and that they purchased said land for the purpose of developing said land, and especially said ten acres, by drilling and boring thereon oil wells for the production of oil, for which said ten acres is regarded by all persons acquainted therewith as certainly valuable.

The plaintiffs further say that the said Joseph S. Brown and others to the plaintiffs unknown are operating the said thirty acres held by them under said lease and have obtained oil in a well or wells operated by them in the vicinity of said ten acres.

The plaintiffs further say that they are advised that their title to said land, and especially said ten acres, is indefeasible, and they are in the possession of said ten acres through their tenant, John F. Taylor, who resides in a dwelling-house within the boundaries of said ten acres and who holds the same under the plaintiffs.

The plaintiffs further say and allege that the said Joseph S. Brown, his agents and attorneys, have set up and asserted some claim to said ten acres of land, and especially of some false and pretended right under and by virtue of said lease, which lease, as to said ten acres, is a cloud upon the title of plaintiffs, which this bill is brought to remove, in order to control and affect the right of the plaintiffs in operating upon and drilling oil wells in said ten acres, and the said defendant, Brown, by his agents and attorneys, threaten to interfere

with the right and possession of the plaintiffs in drilling upon and operating said ten acres of land.

4 The plaintiffs further say and allege that the said claim of the said defendant, his agents and servants, is falsely and without any ground in law or equity based upon the terms and provisions of said lease, whereby the said defendant, his agents and servants, alleged and maintained that the said defendant alone has a right to operate and produce oil upon said ten acres of land, and that the plaintiffs having already commenced operations upon said ten acres of land under their clear legal right and title, the said defendant, his agents and servants, threaten to harass and annoy the plaintiffs, and to prevent them from using and enjoying said ten acres in as full and ample a manner as their ownership in fee simple justifies them in doing, and therefore the plaintiffs, as they allege, are afraid that the defendant, his agents and servants, will by actions, suits, and other proceedings harass, annoy, and interrupt the plaintiffs in their operations on said ten acres of land, which, in order to make the same productive and from which to derive rents and profits, require immediate and continual attention and use in the business of producing oil therefrom, so as to counteract the efforts made by the defendant and others from draining and drawing off from said ten acres the oil underlying the surface thereof.

The plaintiffs further say and charge that they are in danger of irreparable injury in consequence of the interference that may be made by the defendant and those claiming under him on account of the said claim and cloud of the defendant upon said ten acres of land.

In tender consideration whereof the plaintiffs pray that the said defendant may answer this bill; that he, his agents, servants, and attorneys, and all other persons acting under him, may be restrained and enjoined from entering into or upon said ten acres of land, and from instituting or prosecuting any action or suit upon said pretended right or pretended claim of said defendant in any

5 court of law or equity against the plaintiffs, their agents and servants, in respect to said ten acres of land, and that the defendant, his agents, servants, and attorneys, may be prohibited from in anywise vexing, annoying, or interrupting the said plaintiffs, their agents and servants, in their development of said ten acres and in any operations that may be performed thereon.

And that, the premises being considered, *that* the said claim of the defendant and the cloud upon the title of the plaintiffs to said ten acres so set up and asserted by said defendant, his agents and attorneys, may be removed by this honorable court, according to the rule and practice in such cases, and that the plaintiffs may have such other, further, and general relief in the premises as to equity may seem meet; and, as in duty bound, they will ever pray, &c.

B. D. SPILMAN AND
W. N. CHANCELLOR, *By Counsel.*

JNO. A. HUTCHINSON, *Sol.*

WEST VIRGINIA, } *To wit:*
Wood County, }

B. D. Spilman and W. N. Chancellor, the plaintiffs named in the foregoing bill, made oath that the facts and allegations therein contained are true to the best of their knowledge, information, and belief.

B. D. SPILMAN.
W. N. CHANCELLOR.

Given under my hand this 8th day of July, 1890.
JOHN T. HARRIS,
Notary Public.

Exhibit "A" referred to in the foregoing bill is in words and figures following, to wit:

This deed made the 30th day of June, 1890, between John F. Taylor and Rosanna Taylor, his wife, of the county of Pleasants, and State of West Virginia, of the first part, and B. D. Spilman
6 and W. N. Chancellor, of the county of Wood, and State of West Virginia, of the second part, witnesseth:

That for and in consideration of the sum of fifteen thousand dollars cash in hand paid, the receipt of which is hereby acknowledged. The parties of the first part do grant, sell and convey, with special warranty, unto the parties of the second part, all and singular the following-described property, lying and being in the county of Pleasants, and State of West Virginia, on the Ohio river and French creek, and bounded and described as follows: Beginning at a stake in P. T. Parker's line in the St. Mary's pike, at a point designated "A" in the plat, thence north 83¼ degrees east 70 poles to a stake "B," thence north 54½ degrees east 42 poles to a stake in a line of Mary Reeves at "C," thence with a line of said Reeves north 8 degrees west 56 poles to a stake near the French Creek bridge at "D," corner to the original survey, thence with French creek and the meanders of the Ohio river — poles to a stake, corner to R. T. Parker at "G," then with R. T. Parker's line south 2 degree*d* west 44 poles to the beginning, containing forty-four acres and twenty-one poles, excepting, however, therefrom four and $\frac{46}{100}$ acres taken by the Ohio River Railroad Company for their railroad and a "borrow pit" now in its possession, and also excepting a lot belonging to J. William Taylor, fronting fifty feet on the St. Mary's pike or public road, for such distance to measure from the centre of the front of the dwelling-house of said William Taylor on said lot, and running back one hundred and fifty feet from the said pike, making said lot 50 x 150 feet, also excepting the storehouse on the St. Mary's pike, on said tract of land, belonging to T. N. Boss, the said Boss owning the building, but not the ground on which it is situate, he having the right to remove said building; but this deed is subject to a lease

made by the said John F. Taylor to Joseph S. Brown, bear-
7 ing date the — day of July, 1889, for thirty acres of said tract of land for oil and gas purposes. And the lease made by the said Taylor to T. N. Boss, dated February 24th, 1890, for ten acres, a part of said land, not having been complied with by said Boss is in all respects void and of no effect.

But it is agreed that the parties of the first part shall have the privilege of remaining in the house they now occupy and the use of the land for their growing crops now on said land until November 1st, 1890, but such use is not to interfere with the drilling of wells on said land where such crops are not materially interfered with, and it is further understood, covenanted and agreed that the parties of *of* the first part do hereby assign and set over to the parties of the second part and their assigns, the benefit of all covenants, conditions and agreements, and of all actions or rights of action which belong to or appertain to the said John F. Taylor, under and by virtue of any deed or conveyance through which he derived title to said land or by virtue of any contract or lease made by him respecting said tract of land as fully as are now possessed by said Taylors, but it is understood and agreed that said J. William Taylor has no right at any time to drill or authorize the drilling of oil wells on his lot therein described, and if any such wells are drilled the right to do so is reserved to the parties of the second part or their assigns.

Witness the following signatures and seals.

(Signed) J. F. TAYLOR. [SEAL.]
ROSANA TAYLOR. [SEAL.]

STATE OF WEST VIRGINIA, } *To wit:*
Pleasants County, }

I, Aug. M. Campbell, a notary public of the said county, do certify that John F. Taylor, whose name is signed to the writing above, bearing date on the 30th day of June, 1890, has this day acknowledged the same before me in my said county of Pleasants.

Given under my hand this 30th day of June, 1890.

(Signed) AUG. M. CAMPBELL,
Notary Public.

8 STATE OF WEST VIRGINIA, } *To wit:*
Pleasants County, }

I, Aug. M. Campbell, a notary public of said county, do certify that Rosana Taylor, the wife of John F. Taylor, whose names *are* signed to the writing above, bearing date on the 30th day of June, 1890, personally appeared before me in the county aforesaid, and, being examined privily and apart from her husband and having the writing fully explained to her, the said Rosana Taylor acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 30th day of June, 1890.

AUG. M. CAMPBELL,
Notary Public.

Exhibit "B" referred to in the foregoing bill is in words and figures following, to wit:

John F. Taylor to Joseph S. Brown. } Lease.

This lease made this — day of July, A. D. 1889, by and between John F. Taylor, of the county of Pleasants, and State of West Virginia, of the first part, and Joseph S. Brown, of Pittsburg, Pa., of the section part, witnesseth:

That the said party of the first part, in consideration of fifteen dollars in hand paid, the receipt whereof is hereby acknowledged, and the stipulations, rents and covenants hereinafter contained, on the part of said party of the second part, to be paid, kept and performed, hath granted, demised and let unto the said party of the second part, his heirs, executors, administrators or assigns, for the sole and only purpose of boring, mining and excavating for petroleum or carbon oil and gas, and piping of oil and gas over all of that certain tract of land situate in Grant township, Pleasants county, and State of West Virginia, and bounded and described as follows, to wit: On the north by lands of Mrs. Jones
9 and the Ohio river, south by lands of A. Smith, west by county road, east by Mrs. Jones, containing 40 acres, more or less, excepting reserved therefrom ten acres, beginning at the railroad and running thence to the county road, thence south with said county road to A. Smith's line, thence with said Smith's line to a line to be drawn from the railroad to meet it, upon which no wells shall be drilled without consent of the party of the first part. To have and to hold said premises peaceably, and quietly, for the said purposes, only for, during and until the full term of two years next ensuing the date and year above written, or so long thereafter as oil or gas shall continue to be found thereon in paying quantities. The said party of the second part hereby covenants, in consideration of the said grant and demise, to deliver unto the said party of the first part, his heirs and assigns, the full, equal one-eighth part of the petroleum or carbon oil discovered, excavated, mined, pumped and raised on the premises herein leased, as produced in the crude state, to be delivered in pipe lines at the wells, and in case of a gas well being struck and utilized, then in lieu of a royalty, the party of the first part agrees to accept a yearly rental of two hundred dollars for each and every well drilled on above-described premises. All pipe lines shall be laid along the fences, or buried two feet under ground. The said party of the first part to fully use and enjoy the said premises for the purpose of tillage, except such parts as may be necessary for said mining purposes, and a right of way to or from the place or places of said mining or excavating. The said party of the first part hereby grants to the party of the second part the right to remove any machinery, buildings or fixtures, placed on said premises by the said party of the second part. The party of the second part further to have the privilege of using sufficient water from

the premises herein leased for the prosecution of said business. The party of the second part agrees to, and will, within one month from this date, commence a test well for gas and oil in this vicinity, and complete the same within two months thereafter, unavoidable accidents and delays excepted. Said second party is to commence and drill a well on the within-described lands within nine months after the completion of said test well, and to prosecute said drilling with reasonable diligence, to its completion; he is also to pay to first party a monthly rental of ten dollars in advance, until said drilling one well is completed; the party of the second part is to keep up all fences, and to pay any damage done by leaving said fences down by said second party on his premises. A failure of the party of the second part to make said payments will render this lease null and void, not binding on either party. The party of the second part is only to have the right to assign this lease to the company of which he is a member and to no one else without the consent of the first party.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

(Signed) J. F. TAYLOR. [L. S.]
JOSEPH S. BROWN. [L. S.]

Signed, sealed, and delivered in presence of—
GEO. W. BOSS.

STATE OF WEST VIRGINIA, }
Pleasants County, } *ss:*

On this 29th day of July, A. D. 1889, before me, a justice of the peace in and for said county, personally appeared the said John F. Taylor, above named, and acknowledged that he did sign, seal, and deliver the foregoing instrument, and that the same is his free act and deed for the purposes therein named.

Witness my hand and seal the day and year aforesaid.

T. N. BOSS, *J. P.* [L. S.]

WEST VIRGINIA:

PLEASANTS COUNTY COURT,
CLERK'S OFFICE, *August 3rd*, 1889.

The foregoing lease from John F. Taylor to Joseph S. Brown, dated on the — day of July, 1889, was this day, on the certificate of acknowledgment thereto annexed, admitted to record in the office aforesaid and recorded.

Teste: J. L. KNIGHT, *Clerk.*

WEST VIRGINIA:

PLEASANTS COUNTY COURT, CLERK'S OFFICE.

I, J. L. Knight, clerk of the county court of the county aforesaid, do certify that the foregoing is a true copy of a lease from John F. Taylor to Jos. S. Brown, dated on the — day of July, 1889, as recorded in my office.

Given under my hand and the seal of said court this 14th day of July, 1890.

[SEAL.] J. L. KNIGHT, *Clerk.*

And on the 9th day of July, 1890, the following subpœna in chancery was issued:

UNITED STATES OF AMERICA, *District of West Virginia*, } *ss:*

The President of the United States of America to the marshal of the district of West Virginia, greeting:

You are commanded to summon Joseph S. Brown, a citizen of and resident in the State of Pennsylvania, if he be found in your district, to be and appear in the circuit court of the United States for the district of West Virginia aforesaid, at rules, to be held in the clerk's office of said court, at Parkersburg, on the first Monday in August next, to answer a certain bill in chancery now filed and exhibited in said court against him by B. D. Spilman and W. N.
12 Chancellor, citizens of and residents in the State of West Virginia. Hereof you are not to fail under the penalty of the law thence ensuing. And have then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the United States, this 9th day of July, A. D. 1890, and in the 115th year of the Independence of the United States of America.

Attest: L. B. DELLICKER, *Clerk.*

Memorandum.

The said defendant is required to enter his appearance in this suit, in the clerk's office of said court, on or before the first Monday of August, 1890; otherwise the said bill may be taken *pro confesso.*

L. B. DELLICKER, *Clerk.*

The above subpœna in chancery is endorsed as follows: No. 324. United States circuit court, district of West Virginia. B. D. Spilman and W. N. Chancellor *vs.* Joseph S. Brown. Subpœna in chancery, returnable first Monday of August, 1890. Service of spa. accepted for Joseph S. Brown. Thos. I. Stealey, att'y for Jos. S. Brown. J. A. Hutchinson, complainants' solicitor. Marshal's fees, $2.00

13 And on the same day, to wit, on the 9th day of July, 1890, the following temporary injunction was issued:

"At a circuit court of the United States for the district of West Virginia, continued and held at Parkersburg, in and for said district, on the ninth day of July, 1890, the following order was made and entered of record, to wit:

B. D. SPILMAN and W. N. CHANCELLOR
vs.
JOSEPH S. BROWN. } In Equity.

On this 8th day of July, 1890, the above-named plaintiffs, by counsel, presented their bill of complaint, and alleging that they are the owners in fee simple of a tract of 40 acres of land, more or less, lying in the county of Pleasants, State of West Virginia, and also alleging that the defendant, his agents, servants, and attorneys, have set up and asserted some claims to ten acres of said land, whereby they cast a cloud upon the legal title of the plaintiffs to said ten acres of land, and praying an injunction to restrain the defendant, his agents, attorneys, and all other persons acting under him or them, from instituting or prosecuting any suits or actions in any court of law or equity against the plaintiffs, their agents or servants, in respect to said ten acres of land or any part thereof, and from interrupting or annoying, by injunction or otherwise, their development and improvement of said ten acres.

On consideration whereof the said bill is ordered to be filed, and leave is given the plaintiffs to sue out process thereon, and the first day of September, 1890, is fixed for the hearing of the application for said injunction, as prayed for in said bill, and in the meantime the said defendant, his agents and servants, are hereby restrained and enjoined from entering into or upon said ten acres of land in the bill mentioned, and from instituting or prosecuting any action or suits at law or equity upon the said pretended right or claim of the defendant, and from in anywise vexing, annoying, or interrupting the plaintiffs, their agents or servants, in their development and improvement of said ten acres until the hearing of said application by this court and until the further order of this court.

And a copy of this order being served upon the defendant, his agents or attorneys, shall be equivalent to service by notice of the time and place for said application.

(Signed) JACKSON, *Judge.*

July 9th, 1890.

A copy.
Teste: L. B. DELLICKER,
[SEAL.] *Clerk Circuit Court U. S., D. W. Va.*"

Return.

"Served by delivering a copy of the within writ to J. C. Noland, attorney for Duncan Oil Co., at his office, in St. Mary's, on the 9th day of July, 1890.

Marshal's Fees.

1 service	$2 00
30 mi. at .06	1 80
	$3 80

H. S. WHITE, *U. S. Marshal,*
Per C. A. STALNAKER, *Deputy.*"

14 And on another day, to wit, on the 26th day of July, A. D. 1890, the following order was made and entered of record, to wit:

B. D. SPILMAN and W. N. CHANCELLOR
vs.
JOSEPH S. BROWN. } In Equity

This day the defendant tendered his answer to the bill in this cause which is ordered to be filed; and thereupon the defendant also tendered his cross-bill in this cause and moved the court to file the same, which is accordingly done, and gave notice that he would, on a future day of this court, move the court to award him an injunction restraining the plaintiffs, B. D. Spilman and W. N. Chancellor, their agents and servants, from using, for the purpose of drilling oil or gas wells, or in anywise interfering with, the premises in controversy.

The answer of Joseph S. Brown referred to in the foregoing order is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of West Virginia.

B. D. SPILMAN and W. N. CHANCELLOR, Complainants,
vs.
JOSEPH S. BROWN, Defendant. } In Equity.

The answer of the defendant, Joseph S. Brown, to the bill of said complainants filed against him in the above-entitled cause.

This defendant, now and at all times hereafter, saving to himself all and all manner of benefits or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material for him to make answer to, answering, says:

15 That it is true complainants have a deed in fee simple for forty acres of land, as alleged in their bill and described in Exhibit "A" filed therewith; that said forty acres of land are of great value, and that the ten acres in controversy are worth more than ten thousand dollars; but it is not true that said forty acres of land is subject to a lease, embracing only thirty acres of said land, made by John F. Taylor in July, 1889, for oil purposes, and it is not true that the residue of ten acres of said tract of land is not embraced by said lease and is free and unencumbered, as alleged in said bill.

This defendant for answer says that the lease referred to in complainants' bill, made by John F. Taylor in July, 1889, embraced the entire tract of forty acres of land described in Exhibit "A;" that said lease was made for the purpose of drilling oil wells and gas

wells and to obtain oil and gas from the entire tract of forty acres, for a cash consideration of fifteen dollars, paid to said grantor in hand, and for the further consideration of ten dollars per month, in advance, until a well was drilled and fully completed on said leased premises, and thereafter the additional consideration of one-eighth of all oils obtained on said leased premises.

This defendant, further answering, says that the condition expressed in said lease that no wells should be drilled on the ten acres without the consent of the grantor was not, as he understood at the time of entering into said lease, nor does he now understand it as, a limitation to the estate demised, and he now denies that such was intended by either the grantor or this defendant to be a limitation to the estate demised, but, on the contrary, it was understood, and so accepted by the lessor and this defendant, as a condition for the security of the lessor against annoyance from noxious gases and odors from oils in close proximity to his residence.

This defendant, further answering, says that the lessor, having aliened the fee as well as the reversion in and to said leased
16 premises, hath thereby released this defendant from the observance of the condition "not to drill on said ten acres," part and parcel of the forty acres demised to him, and he therefore insists that his right to possess and enjoy the leased forty acres for the purpose of drilling for oil and gas is no longer subject to said condition, and that he is fully and entirely absolved from the observance of said condition.

This defendant, further answering, says that Exhibit "B," filed with and referred to in complainants' bill, demised and let unto this defendant the entire forty acres of land so described therein by "metes and bounds;" that for the purposes therein set forth he has been in full possession of said ten acres, as well as the thirty acres, parts and parcels of the forty acres demised; that the condition not to drill on the ten-acre tract, part and parcel of the demised premises, until the further consent of the lessor, was not a reservation, condition, or covenant running with the land, but was, on the contrary, one, so understood between the grantor and this defendant at the time of the execution of said deed of lease, as personal to the grantor, for his especial personal comfort and security against danger and annoyance from noxious gases and odors that might arise from wells in close proximity to his residence, situate on the ten acres; that such restriction not to drill on said ten acres without the consent of said lessor was such that once removed by license to drill on said ten acres absolved this defendant from further observance thereof for all time.

This defendant, further answering, says that though he has not yet drilled any well on said ten acres, yet he now has the right so to do, because he says, and so avers the fact to be true, that said lessor, before making the grant to complainants of the fee and all reversionary rights, through declarations made to other parties,
17 which were communicated to this defendant, consented to drilling wells on said ten acres, and for such purpose, as well as for any and all other purposes of said demise, this defendant was

at the time of making said grant to complainants in possession of the entire tract of forty acres of land, including said ten acres.

This defendant admits that said tract of ten acres, part of the forty-acre tract demised to him, is valuable for the oil and gas therein underlying the same; that its value, from the best information obtainable by him, and he therefore so states, is not less than five thousand dollars.

This defendant, further answering, says that said deed of demise made by said John F. Taylor to him, a copy of which is filed as Exhibit "B" with complainants' bill, contains and is subject to several covenants, one of which is for quiet and peaceable possession and enjoyment of the demised premises to the full extent of the boundaries thereof of the entire forty-acre tract for the purposes hereinbefore set forth; yet, notwithstanding such covenant, the complainants have violated, broken, and disregarded the same, in that they have taken possession of said ten-acre tract or parcel of said forty-acre tract so demised and are now unlawfully and illegally proceeding to drill several wells for oil and gas on said premises, and to that extent excluded and deprived this defendant of the occupation of so much of said ten acres as complainants occupy for the purpose of drilling for oil and gas aforesaid.

This defendant, further answering, says that the condition not to drill on the ten acres, being personal, and to be exercised by the lessor, John F. Taylor, could not be conferred by him to his grantees; that the right so to drill could not be conferred upon any party or person or corporation; yet this defendant says that he is informed, and so alleges the fact to be, said complainants are attempt-
18 ing to confer such authority to drill on said ten acres upon a company now being formed for that purpose, which this defendant says is in direct violation of the covenants, stipulations, and agreements entered into by and between said John F. Taylor for quiet and peaceable possession and enjoyment of said demised premises with this defendant.

This defendant, further answering, says that it is not true, as alleged in complainants' bill, that the claim of this defendant has alone the right to drill on said demised premises, including said ten acres, is falsely and without any ground in law or equity.

This defendant, further answering, says that it is not true, as alleged in complainants' bill, any effort on his part has been made to prevent complainants from enjoying to the full extent all legal rights under their deed, except in so far as the pretenfions of a right to drill on said ten acres set up by complainants interferes with the legal and equitable rights of this defendant under the covenants and agreements contained in the deed of demise to him made by said John F. Taylor.

This defendant, further answering, says the allegation contained in complainants' bill that the claim of this defendant set up to the ten acres casts a cloud upon complainants' title to said forty acres, including said ten acres, is not true; but, on the contrary, the claim of this defendant is now and always heretofore has been in and to the said ten acres of land by virtue of a full and complete title in

and to the said ten acres vested in the grantors of complainants and this defendant; that the lease or demise contained in Exhibit "B" to complainants' bill this defendant has hitherto and now admits and insists is an ample, full, and complete acknowledgment of title in the demised premises existing and vested in this defendant's landlord, John F. Taylor; and this defendant now says he is now and hath hitherto been ready, upon demand, to attorn to the
19 grantees of his lessor fully and completely in all things wherein it is incumbent upon him to attorn for to said complainants, and in order to the full and perfect attornment incumbent upon this defendant to make unto said complainants, this defendant alleges that before the institution of complainants' suit herein against him he demanded and notified complainants of his readiness to so attorn and at the same time notified them that he was ready to and demanded possession of said ten acres for the purpose of drilling thereon oil and gas wells by virtue of his demise contained and set forth in Exhibit "B," but for such purpose said complainants refused him possession of such part of ten acres as was necessary therefor.

This defendant, further answering, denies the allegation in complainants' bill that such interference as is alleged and set forth, if accomplished, would produce irreparable injury or cause any damage or cast any cloud upon complainants' title in or to said land in controversy.

This defendant insists that, being the lessee of John F. Taylor, the grantor to complainants, he is now the lessee of by virtue of the conveyance to of all reversionary interest and the fee simple of said lands of the complainants, as such has attorned as fully up to this date as is possible for him to do, and that all acts and doings of this defendant by virtue of the legal rights conferred upon him by said lease have been strictly in accordance with and by virtue of the covenants in the deed of lease filed as Exhibit "B" with complainants' bill.

And this defendant, having now answered all allegations contained in complainants' bill as fully and specifically as though specially interrogated thereto, prays that said injunction may be dissolved and complainants' bill dismissed, with costs to this defendant; as in duty bound, he will ever pray, etc.

JOSEPH S. BROWN.

THOS. I. STEALEY,
Counsel for Defendant.

20 STATE OF PENNSYLVANIA, WESTERN DISTRICT, } ss:
County of Allegheny and City of Pittsburgh, }

This day Joseph S. Brown personally appeared before the undersigned, a commissioner of the circuit court of the United States in and for the western district of Pennsylvania, and, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing answer are true to the best of his knowledge, information, and belief.

JOSEPH S. BROWN.

Sworn — and subscribed before me, at Pittsburgh, Pa., this 18th day of July, A. D. 1890.

[SEAL.] S. C. McCANDLESS,
U. S. Commissioner.

The cross-bill referred to in the foregoing order is in words and figures as follows:

In the Circuit Court of the United States for the District of West Virginia.

To the honorable judges thereof:

The cross-bill of Joseph S. Brown, plaintiff, *vs.* B. D. Spilman and W. N. Chancellor, defendants, filed in the case of B. D. Spilman and W. N. Chancellor, plaintiffs, *vs.* Joseph S. Brown, defendant, in equity, in the circuit court of the United States for the district of West Virginia.

Joseph S. Brown, a citizen of the State of Pennsylvania, files this cross-bill of complaint against B. D. Spilman and W. N. Chancellor, citizens of the State of West Virginia, in the case of
21 said B. D. Spilman and W. N. Chancellor, plaintiffs in the above-entitled cause.

And thereupon your orator complains and says that heretofore, on the 8th day of July, 1890, said defendants herein filed their original bill against your orator in the circuit court of the United States for the district of West Virginia, in which bill complainants therein set up title to a tract of about forty acres of land in Pleasants county, West Virginia, which is therein in said bill alleged to have been derived by said Spilman and Chancellor by conveyance to them by deed from John F. Taylor, which title is set forth in Exhibit "A," filed with said original bill; that said title or conveyance was subject to a lease made by John F. Taylor for thirty acres of said forty acres to your orator for oil purposes, and that ten acres, the residue of said forty acres, is not embraced by said lease, but is free and unencumbered, and is owned by said plaintiffs in fee simple, and was so held by John F. Taylor at the time he conveyed the same to the plaintiffs, and that said ten acres *is* bounded and described as set forth in said lease, a copy of which is filed as Exhibit "B" with said original bill.

It is further alleged in said original bill that said ten acres so described in said lease and so held by said plaintiffs in fee simple *is* valuable chiefly, if not entirely, on account of the valuable oil and minerals underlying its surface, and that they purchased said land for the purpose of developing said land, and especially said ten acres, by drilling and boring thereon oil wells for the production of oil, for which said ten acres *is* regarded by all persons acquainted therewith as certainly valuable.

It is further alleged in said bill that your orator and others to the plaintiffs in said bill unknown are operating the said thirty acres held by them (the defendants in said bill) under said lease

and have obtained oil in a well or wells operated by them in the vicinity of said ten acres.

22 It is further alleged in said original bill that plaintiffs are advised that their title to said land, and especially said ten acres, is indefeasible, and they are in possession of said ten acres through their tenant, John F. Taylor.

It is further alleged in said original bill that your orator (Joseph S. Brown), his agents and attorneys, have set up and asserted some claim to said ten acres of land, and especially of some false and pretended right under and by virtue of said lease, which "lien as to said ten acres is a cloud upon the title of plaintiffs, said (Spilman and Chancellor)," which their original bill is brought to remove; that in order to affect the right of the plaintiffs in operating upon and drilling oil wells in said ten acres *and* the said defendant, Brown, by his agents and attorneys, threaten *with* the right and possession of the plaintiffs in drilling upon and operating said ten acres of land.

It is further alleged in the original bill that the said claim of the said defendant, his agents and servants, is falsely and without any ground in equity or law based upon the terms or provisions of said lease, whereby the said defendant alone has a right to operate and produce oil upon said ten acres of land, and that the plaintiffs having already commenced operations upon said ten acres of land under their clear legal right and title, the said defendants, his agents and servants, threaten to harass and annoy the plaintiffs and to prevent them from using and enjoying said ten acres in as full and ample a manner as their ownership in fee simple justifies them in doing, and therefore the plaintiffs, as they allege, are afraid that the defendant, his agents and servants, will by actions, suits, and other proceedings harass, annoy, and interrupt the plaintiffs in their operations on said ten acres of land, which, in order to make the same productive and from which to derive rents and profits, require immediate and continual attention and use in the business of producing oil therefrom 23 as to counteract the efforts made by the defendant and others from draining and drawing off from said ten acres the oil underlying the surface thereof.

It is further alleged and charged in said original bill that plaintiffs are in danger of irreparable injury in consequence of the interference that may be made by defendant and those claiming under him on account of the said claim and cloud of said defendant upon said ten acres of land.

Said original bill concludes with a prayer that defendant, Joseph S. Brown, be required to answer said bill; that he, his agents and attorneys and servants and all other persons acting under *him*, may be restrained and enjoined from entering into and upon said ten acres of land and from instituting or prosecuting any action or suit upon said pretended right or pretended claim of said defendant in any court of law or equity against the plaintiffs, their agents and servants, in respect to said ten acres of land, and that the defendant, his agents, servants, and attorneys, may be prohibited from in anywise vexing, annoying, or interrupting the said plaintiffs, their

agents and servants, in their development of said ten acres and in any operation that may be performed thereon; and, the premises being considered, that the claim of the defendant and the cloud upon the title of the plaintiffs to said ten acres so set up and asserted by said defendant, his agents and attorneys, may be removed, according to the rules and practice in such cases, and that plaintiff may have other, further, and general relief, &c.

To which bill your orator has accepted service of process by his counsel, Thos. I. Stealey, and now herewith tenders and asks that his answer thereto may be filed; that the same may, together with the original bill and exhibits, be read as part of this bill on the hearing of the same.

24 Your orator would now show, as matter constituting ground for this his cross-bill and for affirmative relief in the cause, that his right, title, and possession of the forty-acre tract of land of which said ten-acres tract is a part exists by virtue of a deed of lease made on the 29th day of July, 1889, duly acknowledged and admitted to and recorded in the office of the clerk of the county court of Pleasants county, West Virginia, and that said plaintiffs in the original bill are affected by the constructive notice thereof and all its provisions and covenants, a copy of which deed, with its certificates of acknowledgment and recordation, is here filed and asked to be read as part of and Exhibit "A" to this bill.

Your orator would show that he has a leasehold estate in and to the entire tract of forty acres, including the ten acres claimed as free from incumbrance in the original bill; that his right to bore or drill oil and gas wells over all of said tract of land, embracing said ten acres, was completely vested in him by the demise or granting part of said deed of lease; that the condition therein contained whereby your orator was restricted in the exercise of said right not to drill oil or gas wells on the ten-acre tract, part and parcel of said forty acres, until consent was given by the grantor, John F. Taylor, was a condition for the personal benefit, comfort, and enjoyment of said Taylor, but was not a limitation to the estate demised to your orator; that no condition or right of defeasance by re-entry was reserved in said deed as a penalty for non-observance of said condition or breach thereof by your orator, and that it is a condition repugnant to and subversive of the object of said demise, and is therefore null and void.

Your orator would further show that said ten acres of land, as well as the entire tract of forty acres, is very valuable for and on account of the oil underlying the same; that its real value can only be approximated, and as an estimate of its value your orator says it certainly is worth at least five thousand dollars for oil purposes

25 alone; that when he obtained said demise the consideration in money and rental of cash and oil applied to the entire forty acres and not merely thirty acres, as your orator is informed the plaintiffs in the original bill contend for. Your orator says that soon after obtaining said demise of the forty acres he took possession thereof under and by virtue of said deed; that all the covenants and agreements in said deed contained and set forth to be kept, ob-

served, and performed by your orator have been faithfully and fully kept, observed, and performed by him, and that since the purchase of said premises, subject to said lease by said B. D. Spilman and W. N. Chancellor, he has attorned to them as fully in all respects as was incumbent upon him by virtue of the covenants made and contained in said deed with the grantor of your orator and said Spilman and Chancellor.

Your orator says that said condition not to drill on said ten acres of land without the consent of said lessor, John F. Taylor, if at any time binding upon him, was before the making of said conveyance to said B. D. Spilman and W. N. Chancellor removed by the consent of the said John F. Taylor to permit your orator to drill oil and gas wells on said ten acres, and your orator says and charges that he was preparing and procuring material to develop said ten acres by drilling wells thereon when, by the sale and conveyance and entry into possession of said ten acres by said B. D. Spilman and W. N. Chancellor, his operations thereon were stopped, prevented, and your orator's right to possess said ten acres invaded by said B. D. Spilman and W. N. Chancellor.

Your orator would show that said defendants herein, Spilman and Chancellor, are now having drilled two wells for the purpose of obtaining oil and gas on the tract of ten acres covered by the lease made to your orator on the 29th day of July, 1889, a copy of which is herewith filed as Exhibit "A" and asked to be read as part hereof.

Your orator further says that the drilling of said two wells on said ten acres by said defendants, Spilman and Chancellor,
26 is casting a cloud upon his title to use and occupy said ten acres for the purpose set forth in said lease; that said defendants, Spilman and Chancellor, threaten to drill other wells on said ten acres. Your orator says that said ten acres are chiefly valuable for the oil and gas underlying the same, and that to obtain which was the chief inducement to the purchase of said lease; that the acts of defendants, Spilman and Chancellor, in drilling said wells, if successful, will deprive your orator of a large portion of the consideration for which he paid his money to said John F. Taylor.

Your orator further says that if said defendants are permitted to bore oil wells on said ten acres the oil on the remainder of said forty-acre tract, in close proximity to defendants' proposed wells on said ten acres, will be drawn from, and thus in a double capacity will they, the said defendants, Spilman and Chancellor, inflict irreparable injury on your orator's rights and interest in said lease, for which he cannot have an adequate remedy at law.

To the end, therefore, that your orator's rights may be fully adjudicated and protected in the premises, — prays that this his cross-bill to the original bill of said Spilman and Chancellor exhibited against him may be entertained, and, the premises being considered, that said B. D. Spilman and W. N. Chancellor may be made defendants to this cross-bill and true answers hereto make; that process may issue requiring each of said defendants to appear hereto; and, your orator being remediless in the premises save only in a court of equity, where such matters are heard and determined,

further prays that said defendants, B. D. Spilman and W. N. Chancellor, may be enjoined and inhibited from drilling oil wells or gas wells on said ten acres or in anywise interfering with your orator in boring oil and gas wells on said ten acres, and that for the purpose of prosecuting the work therefor, and to enable your orator to fully reap the profits of his lease, also further prays that
27 his title to said leasehold estate may be established to the extent of the boundaries of the forty-acre tract set forth in said deed of lease, and that he may be put in possession of said ten acres, part and parcel thereof; as in duty bound, he will ever pray, &c.

JOSEPH S. BROWN,
By his attorney, J. C. NOLAND.

THOS. I. STEALEY,
Counsel for Joseph S. Brown.

STATE OF WEST VIRGINIA, }
Wood County, } *ss:*

This day personally appeared before the undersigned, notary public in and for Wood county, in the State of West Virginia, Joseph C. Noland, who says that he is the attorney and agent for Joseph S. Brown, the complainant in the foregoing bill, and upon oath says that the facts and allegations therein set forth are true to the best of his knowledge, except such as therein made upon information he believes to be true.

J. C. NOLAND.

Subscribed and sworn to before me this — day of July, 1890.
[SEAL.] L. N. TAVENNER,
Notary Public of Wood Co., W. Va.

And on the same day, to wit, on the 26th day of July, 1890, the following subpœna in chancery was issued:

UNITED STATES OF AMERICA, }
District of West Virginia, } *ss:*

The President of the United States of America to the marshal of the district of West Virginia, Greeting:

You are hereby commanded to summon B. D. Spilman
28 and W. N. Chancellor, citizens of and residents in the State of West Virginia, if they be found in your district, to be and appear in the circuit court of the United States for the district of West Virginia aforesaid, at rules, to be held in the clerk's office of said court, at Parkersburg, on the first Monday in September next, to answer a certain cross-bill in chancery now filed and exhibited in said court against them by Joseph S. Brown, a citizen of and resident in the State of Pennsylvania.

Hereof you are not to fail under the penalty of the law thence ensuing; and have then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of July, A. D. 1890, and in [SEAL] the 115th year of the Independence of the United States of America.

Attest: L. B. DELLICKER, *Clerk.*

Memorandum.

The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of September, 1890; otherwise the said bill may be taken *pro confesso.*

L. B. DELLICKER, *Clerk.*

Endorsement: United States circuit court, district of West Virginia. No. 324. Joseph S. Brown *vs.* B. D. Spilman and W. N. Chancellor. Subpœna in chancery, returnable first Monday of Sept., 1890. T. I. Stealey, complainants' solicitor.

The return on the above subpœna is in words and figures following, to wit:

Served the within writ by delivered an office copy thereof to W. N. Chancellor, at Parkersburg, W. Va., in person, on the 28th
29 day of July, 1890. Served this writ by delivering an office copy thereof to B. D. Spilman at Parkersburg, W. Va., in person, on the 28th day of July, 1890, at his office, in said city of Parkersburg.

Marshal's fees: 2 services, $4.00.

H. S. WHITE,
U. S. Marshal,
Per G. STOUT, *Deputy.*

And on the 21st day of August, 1890, the following replication was filed in the clerk's office, to wit:

In the Circuit Court of the United States for the District of West Virginia.

B. D. SPILMAN and W. N. CHANCELLOR } In Equity.
vs.
JOSEPH S. BROWN. }

Replication of Plaintiffs to the Answer of the Defendant, Filed in This Cause.

These repliants, saving all manner of exception which can or may be had or taken to the said answer of the said defendant for the many errors and uncertainties and insufficiencies in the same contained, for replication thereto say that they do and will aver and prove their said bill to be true, certain, and good in law to be answered unto by said defendant, and that the answer of said defend-

ant is uncertain, evasive, and insufficient in law to be replied to by this repliant; without this, that the said answer is in anything true or sufficient.

All which matters and things these repliants are ready to aver, maintain, and prove as this honorable court shall direct, and they humbly pray us in and by their said bill they have already prayed.

Aug. 21st, 1890.

JNO. A. HUTCHINSON.
Sol. for Repliants.

30 And on the same day, to wit, on the 21st day of August, 1890, the following demurrer was filed in the clerk's office:

In the Circuit Court of the United States for the District of West Virginia.

SPILMAN & CHANCELLOR
vs.
JOSEPH S. BROWN
and
JOSEPH S. BROWN
vs.
SPILMAN & CHANCELLOR
} In Equity.

Upon a cross-bill.

Demurrer to Cross-bill by B. D. Spilman & W. N. Chancellor, Defendants Named Therein.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the bill of complaint contained to be true in such manner or form as the same are therein set forth and alleged, *doth* demurrer to said bill.

And for causes of demurrer show*eth*:

I. That it appeareth by said bill that the said plaintiff is not entitled to the relief prayed for by said bill of complaint against these defendants.

II. That there is not equity in said bill or any claim or ground for any discovery from these defendants or either of them.

Wherefore, and for divers other good causes of demurrer appearing on said bill, these defendants do demur to the same, and they pray the judgment of this honorable court whether they shall be compelled to make any answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

B. D. SPILMAN &
W. N. CHANCELLOR,
By Counsel.

31 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JNO. A. HUTCHINSON,
Sol. for Defendants.

And on another day, to wit, on the 25th day of August, 1890, the following order was made and entered of record, to wit:

SPILMAN & CHANCELLOR *vs.* JOSEPH S. BROWN } In Equity. Upon Original Bill.

and

JOSEPH S. BROWN *vs.* SPILMAN & CHANCELLOR. } In Equity. Upon Cross-bill.

By agreement of counsel these causes are set down for hearing upon the bill and exhibits and answer and replication to said answer to the original bill and upon the cross-bill and demurrer to said cross-bill.

And upon this 25th day of August, 1890, these causes are submitted to the court, with leave to the counsel to file briefs herein within thirty (30) days from this date.

And on the 10th day of February, A. D. 1891, the following opinion was rendered and a written copy thereof filed in the clerk's office of said court, to wit:

32 In the Circuit Court of the United States for the District of West Virginia.

B. D. SPILMAN and W. N. CHANCELLOR *vs.* JOSEPH S. BROWN. } In Equity.

JOSEPH S. BROWN *vs.* B. D. SPILMAN and W. N. CHANCELLOR. } Upon a Cross-bill.

John A. Hutchinson, for plaintiffs; Thomas I. Stealey, for defendants.

JACKSON, *Judge:*

The complainants file their bill, seeking to remove a cloud upon their title, and allege that they are the owners in fee simple of a tract of forty acres of land in the county of Pleasants, in this State, which was conveyed to them by John F. Taylor and wife, by deed bearing date on the 30th day of June, 1890. It is further alleged in the bill that this tract of land is subject to a lease for oil purposes, embracing about thirty acres of land, made by the grantor in the deed in July, 1889, to Joseph S. Brown, and that the residue of ten

acres is not embraced by said lease and is unencumbered by it and was held by the said Taylor in fee simple at the time he conveyed the tract of forty acres to the plaintiffs in this action.

Other grounds of relief are set up in the bill, which are unimportant and therefore not considered.

The land in controversy is chi-fly valuable for the oil and minerals supposed to underlie its surface.

The defendant in his answer admits that the plaintiffs have purchased the land in fee from Taylor and obtained his deed therefore, but he denies that the forty acres of land are subject to a lease embracing only thirty acres, as alleged in the plaintiffs' bill; on
33 the contrary, he files his cross-bill claiming a leasehold estate in the entire tract of forty acres, as is shown by his lease of July, 1889, legally recorded in the county where the land lies, which he claims was constructive notice of his rights under it, which contains a provision that "no wells shall be drilled without the consent of the grantor upon the ten acres," claiming it to be a limitation on the right of the lessee to bore wells on the ten acres, and nothing more.

The question presented for the consideration of the court turns upon the construction of the lease executed by John F. Taylor to the defendant, Brown, in July, 1889. That lease describes the property granted as "bounded on the north by lands of Mrs. Jones and the Ohio river, south by lands of A. Smith, west by the county road, east by Mrs. Jones, containing 40 acres, more or less," 'excepting reserved therefrom 10 acres'" beginning at the railroad, and running thence to the county road, thence south with the county road to A. Smith's line, thence with A. Smith's line to a line to be drawn from the railroad to meet it, upon which no wells shall be drilled without the consent of the party of the first part."

The contention of the plaintiff is that this is a reservation and exception in the lease by the grantor, Taylor, to the defendant, Brown, which expressly reserves ten acres upon which no wells shall be drilled except by the permission of the grantor, while the contention of the defendant is that the words used and employed have not the force and effect of an exception or reservation, but that it is a limitation, and that it is repugnant to the grant and therefore void.

34 What, then, did the defendant acquire when he took his lease with an exception expressly defined and excluding it from the thing granted?

To answer this inquiry requires the court to determine the force and effect of the words "excepting reserved therefrom 10 acres," used by the grantor in his lease to the defendant.

Are these words to be treated as an exception, or are they words of a mere limitation upon the grant?

It is not an unusual thing for parties to grant a tract of land by exterior boundaries, reserving and excepting within the boundaries a certain amount of land. It was not an unusual thing in the history of grants from the Commonwealth of Virginia to issue what are called "inclusive grants," granting a large amount of land within

specified and enumerated boundaries and reserving and excepting within those boundaries lands that either had theretofore been granted or upon which entries had been made, but upon which no grant had issued.

Reference to the old Horn books of the common law inform us that deeds containing exception, reservation, and restriction were not unusual in the early history of jurisprudence.

Shepperd's Touchstone says "that an exception is a clause of a deed whereby the feefor, donor, grantor, or lessor doth except out of that which he had granted before by the deed or which was embraced within its terms."

Plowden, 361, 195; Dyer, 59; Perkins, sec. 625.

Coke on Littleton says "that an exception most commonly and properly succeeds the description of the thing granted, and is made by words of similar import. Under such circumstances the
35 thing excepted is exempted and does not pass by the grant; neither is it a parcel of the thing granted; but this exception may be in any part of the deed, and it has been so resolved.

Hil., 17 Car.

The same author says: "There is a diversity between a reservation and exception." The exception "is ever of part of the thing granted and of a thing *in esse*," whilst a reservation "is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised;" and he adds, "that some time the word reserved hath the force of saving or excepting."

"Every exception must be by apt words. It must be a part of the thing only, and not of all the greater part that has been granted, and not of some other thing. It must be of such a portion as is severable from the thing granted, and not of an inseparable incident, and it must be that which properly belongs to the grantor."

Modern authorities at this day approve the definition of exception as given by the commentators we have referred to.

Lomax, in his digest of the laws respecting real property in this country, says that an exception in a deed is that whereby the grantor excepts something out of that which he has before granted, by which means it does not pass by the grant and is severed from the thing granted.

Washburne on Real Property, in defining an exception, says: "If the grantor wish to except anything out of what he may in general terms have granted, it is proper that such exception should follow the description of the thing granted, and it comes, therefore, under the head of the premises in the deed, as an exception
36 is the taking of some thing out of the thing granted which would otherwise pass by the deed. It may be said in general terms that it ought to be stated and described as fully and accurately as if the grantee were the grantor of the thing excepted and the grantor in the deed were made the grantee by the exception. It must be a part of the thing included in the grant, and to be taken in substance out of that."

In Munn against Warrell, 53rd New York, the deed, after describing the land conveyed, contained this exception: "Saving and excepting from the premises hereby conveyed all and so much and such part and parts thereof as has or have been lawfully taken for a public road or roads." The court held in that case that the exception covered by the land taken for the public highway across the premises did not create a public easement therein, but that the fee of the land so covered remained in the grantor and passed by a subsequent conveyance thereof to a third person.

So, in Low against Settle, 32nd West Va., 600, it was held that a deed conveying a tract of land by boundary, but excluding a tract of fifty acres theretofore sold to another other than the grantee in such deed, does not pass to such grantee legal title to said fifty acres, even though no deed for said fifty acres had been made to such other person who purchased it.

In the case of Roberts against Robertson, 38 American Reports, the court held that where the deed contains a specific description of the land conveyed and contains a general clause reserving lots designated by numbers, without any particular description by boundary that the reservation was good, holding in that sense that
37 the word "reserving" used in the deed, in strict sense, means "excepting."

For the principle stated by the cases cited numerous other modern authorities might be relied on.

As opposed to this position, it is claimed by the defendant that if the language used be an exception, then it is repugnant to the object of the grant and therefore void, and Taylor's Landlord and Tenant, sections 156, 7 and cases there referred to, are relied on in support of this objection, where it is laid down that "an exception of that which is expressly granted will be void for repugnancy," as if a man leases twenty acres excepting ten acres; there the exception is held to be void.

In the view we take of this case, it is unnecessary for us to determine whether the rule thus laid down by the defendant is law. We think that there is no such repugnancy as is claimed in this case. The exception in this case is not out of a thing that has been previously granted, but is a part and parcel of the very substance of the granting clause.

In the case of Greenleaf's Lessee against Burk, 6 Peters, Judge Storey, speaking for the Supreme Court, lays down the law that where a thing forming the exception is of the thing granted and incorporated in substance in the granting clause, that the exception is not repugnant to the grant.

Another position of the defendant is that the words employed excepting the ten acres from the grant *was* a mere limitation upon the rights of the lessee to bore wells and nothing more, and for this position he relies upon a decision rendered by the supreme court of Pennsylvania in the case of Westmoreland Natural Gas Co. against Dewit, to be found in 130 State Reports.

38 The controversy in that case arose over a lease which contained the following provision: "No wells to be drilled within three

hundred yards of the brick building belonging to J. H. Brown," and the question was whether this was a reservation in favor of the landlord. The court in that case held that it was not a reservation, but only a limitation upon the right of the lessee to bore wells, and nothing more. The language used and employed in that lease was a mere restriction upon the particular party; there were no words of exception or reservation to be found in it; there was no estate excepted or reserved or carved out of the grant. It was a mere inhibition upon the part of the lessee to drill wells within a certain specified distance of the grantor's dwelling-house.

When we refer to the lease we have under consideration we find that the grantor, in declaring the exception, used the words "excepted, reserved therefrom ten acres." It is not manifest that he employed the two words "excepted, reserved" indiscriminately, and that his object and purpose of using them as he did was to secure an exception and exemption of the ten acres from the grant of power in the lease. It describes the tract of forty acres by metes and bounds, describing it in such a way as to leave no misapprehension or misconception as to the intention of the parties to it.

It is true that in this connection, after describing the estate to be "reserved, excepted," he added the words "upon which no wells shall be drilled without the consent of the party of the first part."

It is not apparent to my mind why the grantor used this language. If he intended to exempt the ten acres from the lease to Brown,
39 then this restriction was unnecessary. If he did not intend to exempt the ten acres from the lease, but merely to restrict the lessee from boring on the ten acres upon which his dwelling-house stood, then it was unnecessary to carve out by specific metes and bounds an estate which he declared by apt legal terms to be "excepted, reserved" from the grant in the lease.

These words are usually employed as expressing the intention of the party who desires to carve out and exempt an estate within the boundaries of a grant or deed which embraces the portion to be reserved.

I am therefore inclined to the opinion that the grantor used the words out of great precaution, intending that they should be not only a notice to the lessee, but to any one who might acquire his rights under the lease. They were not used in a restrictive sense, but were clearly intended to make an exception and reservation tantamount and equivalent to a grant.

We cannot conceive what words the grantor could have employed or used which would have expressed his purpose and intention more strongly than the words he used in carving out this exception.

It is unlike the case relied upon by the defendant, for there was no estate carved out by specific metes and bounds, but a mere general description of the estate, with a restriction that no wells should be drilled within three hundred yards of the house of the grantor.

But if this was not so, still it is well settled that a title acquired by a grantor in the manner that Taylor acquired his title to the ten

acres is as good as if acquired by direct grant or conveyance
40 from another party.

In the case of Stockbridge Iron Co. *vs* The Hudson Iron Co. the supreme court of Massachusetts held that "whatever is excluded from the grant by exception remains in the grantor as of his former title or right." 107 Mass., 321. In that case there was a reservation upon the part of the grantor to mine for iron ore, &c., which the court construed to be a reservation of new rights to the grantee out of the granted premises, "having the effect, as we have before seen, of a grant from the lessee to the lessor."

Applying to this case the rule laid down by the authorities defining an exception, we resolve any doubts that may exist as to the legal construction of the lease relied on to defeat the plaintiffs' action.

We conclude, therefore, that the exception by which the grantor excepted to himself ten acres of land, and by which he carved out an estate of ten acres, in disposing of the whole tract by its exterior boundaries, did not convey any portion of the ten acres to the defendant, and the grantor had a perfect right after the execution of that lease to make any further disposition of the ten acres so excepted and reserved as in his own judgment he thought best to do.

In reaching this conclusion I have adopted the rule of construction which exists in all cases of identity where deeds and descriptions of lands are conveyed or excepted from grant. It is a familiar principle that a grant of land will not be held void for uncertainty if the court can see that the testimony will render certain the land granted; and so a deed is not to be held void for uncertainty if by
a fair construction of the words employed and used in the
41 grant the deed can be made valid. In this case there can be no question as to the locality and description by boundaries not only of the forty acres but of the ten acres reserved, excepted, and carved out of it. The description is made so certain by metes and bounds that the court must hold it to be sufficient, and that the reservation and exception operates as a grant from the grantor in this case as if he was the grantee; or, in other words, it has the effect of being a grant to himself. It is apparent to my mind that the parties intended to lay off the ten acres and reserve it from the grant, otherwise they would not have given the boundaries of three sides of the ten acres, and then stated that the closing line was to be from the end of the third line to the beginning.

There is nothing in the pleadings or the evidence in this case which would justify the court in reaching any other conclusion. If it was the intention of the grantor to convey all his rights in the ten acres to the lessee under the lease of July, 1889, then there was no occasion for a reservation or exception of the ten acres. All that would have been necessary for him to do was to have inhibited and restrained the party from boring within a certain distance of his residence, as in the Pennsylvania case.

This he did not do, but, on the contrary, he carved out, as we have before said, an estate of ten acres by specific metes and bounds.

A decree will be passed dismissing the cross-bill and perpetually

inhibiting and restraining the defendant, his assignee or
42 those claiming under him, from in anywise interfering with the ten acres reserved, and directing the surveyor of this court to go upon the land and lay off the ten acres by metes and bounds, as set out and described in the exception and reservation contained in the lease.

And on the same date, to wit, on the 10th day of February, A. D. 1891, the following order was made and entered of record, to wit:

B. D. SPILMAN and W. N. CHANCELLOR } In Equity.
vs.
JOSEPH S. BROWN }

and

JOSEPH S. BROWN } In Equity. Upon a Cross-bill.
vs.
B. D. SPILMAN and W. N. CHANCELLOR. }

This cause came on at this term to be further heard, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that said cross-bill of said Joseph S. Brown be, and the same is hereby, dismissed with costs to said defendants in said cross-bill in that behalf expended.

And thereupon, for reasons in writing filed in the papers of this cause, the court is of opinion that the plaintiffs, Spilman and Chancellor, are entitled to the relief prayed for, and doth find that the ten acres of land mentioned, described, and set forth in the deed of lease bearing date July, 1889, filed with the bill of complaint and executed by John F. Taylor to said Joseph S. Brown, was ex-
43 cepted and reserved by said grantor and did not pass to said Joseph S. Brown by virtue of said lease, and that the deed of said John F. Taylor and wife to said B. D. Spilman and W. N. Chancellor, bearing date the 30th day of June, 1890, for the tract of forty acres of land therein described, lying on the Ohio river and French creek, in Pleasants county, W. Va., conveyed and passed said ten acres free and clear of any claim or right or interest of said Joseph S. Brown under said lease.

And it is therefore ordered, adjudged, and decreed that the said defendant, Joseph S. Brown, his agents, attorneys, and assigns, and all other persons acting under him, be and they are hereby perpetually restrained and enjoined from entering into or upon said ten acres of land, and from instituting or prosecuting any action or suit under said lease in respect to said ten acres against said plaintiffs or their assigns, and from interfering with or interrupting in any manner the use and development of said ten acres of land for any purpose by said plaintiffs or their assigns, and that said defendant and his assigns and all persons claiming under him be forever barred and prohibited from using or setting up said claim to said ten acres under said lease, and that the plaintiffs recover against the defendant their costs about their suit in this behalf expended.

And it is further ordered that F. M. Triplett, surveyor, residing in Pleasants county, who is hereby specially appointed for the purpose, do go upon the land aforesaid and lay off said ten acres, so excepted and reserved in said lease, "beginning at the railroad and running thence to the county road, thence south with the county road to A. Smith's line, thence with said Smith's line to a line to be drawn from the railroad" to meet said Smith's line, so that the area shall include said ten acres, by metes and bounds, and that he return a plat of his survey, to be filed by the clerk in the papers of this cause, with a statement of his fees and expenses, to be taxed in the costs of this suit.

43½ On motion of the defendant, an appeal is allowed from this decree, to take effect upon the defendant or some responsible person for him filing bond, as required by law, in the penalty of five hundred ($500) dollars, with good security, to be approved by the judge of this court.

44 And on another day, to wit, on the 18th day of February, A. D. 1891, the following bond was filed in the clerk's office of said court:

Know all men by these presents that we, Joseph S. Brown and James B. Youngson, are held and firmly bound unto B. D. Spilman and W. N. Chancellor in the full and just sum of five hundred dollars, to be paid to the said B. D. Spilman and W. N. Chancellor — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at a circuit court of the United States for the district of West Virginia, at Parkersburg, in a suit depending in said court between B. D. Spilman and W. N. Chancellor, complainants, and Joseph S. Brown, defendant, a decree was rendered against the said Joseph S. Brown, and the said Joseph S. Brown having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said B. D. Spilman and W. N. Chancellor, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Joseph S. Brown shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) JOSEPH S. BROWN. [SEAL.]
JAS. B. YOUNGSON. [SEAL.]

Sealed and delivered in presence of—
H. D. GAMBLE.

Approved by—
J. J. JACKSON,
U. S. Dist. Judge.

45 WESTERN DISTRICT OF PENNA., *ss:*

Before me personally — James B. Youngson, who, being duly sworn according to law, doth depose and say that he is the owner of real estate situated within the western district of Pennsylvania worth the sum of one thousand dollars over and above all just debts and liabilities.

JAS. B. YOUNGSON.

Sworn to and subscribed before me this 16th day of February, A. D. 1891.

H. D. GAMBLE,
Clerk U. S. Circuit Court.

And now, Feb'y 16th 1891, personally appeared in the circuit court of the United States for the western district of Pennsylvania the within-named Joseph S. Brown, principal, and James B. Youngson, surety, and duly acknowledged and executed the within bond, and I certify that in my opinion the said bond is good and the surety sufficient for the amount thereof.

(Signed) M. W. ACHESON, *Cir. J.*

And on the same day, to wit, on the 18th day of February, 1891, the following citation was issued from the clerk's office of said court:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of West Virginia, Greeting:

46 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between B. D. Spilman and W. N. Chancellor, complainants, and Joseph S. Brown, defendant, a manifest error hath happened, to the great damage of the said Joseph S. Brown, as by said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
[SEAL.] of the said Supreme Court, the 18th day of February, in the year of our Lord one thousand eight hundred and ninety-one.

L. B. DELLICKER,
Clerk of the Circuit Court of the United States,
District of West Virginia.

Allowed by—
J. J. JACKSON,
U. S. Dist. Judge.

The endorsement of service on the back of said citation is as follows:

"We accept service on the within this 18th Feb'y, 1891. W. N. Chancellor. Jno. A. Hutchinson, sol. for B. D. Spilman. Marshal's fees, $1.00."

47 Circuit Court of the United States of America for the District of West Virginia.

I, L. B. Dellicker, clerk of said court, do hereby certify that the foregoing is a true transcript of the record in the case of B. D. Spilman and W. N. Chancellor *vs.* Joseph S. Brown, upon an original bill, and Joseph S. Brown *vs.* B. D. Spilman and W. N. Chancellor, upon a cross-bill, on file and of record in my said office.

Seal Circuit Court United States, District West Virginia, Parkersburg, West Va.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Parkersburg, in said district, on this 18th day of February, A. D. 1891.

L. B. DELLICKER,
Clerk Circuit Court U. S., W. Va.

Fee for transcript, —.

Endorsed on cover: Case No. 14,491. West Virginia C. C. U. S. No. 389. Joseph S. Brown, appellant, *vs.* B. D. Spilman & W. N. Chancellor. Filed February 24, 1891.

Office Supreme Court U. S.
FILED.
DEC 14 1893
JAMES H. MCKENNEY,
CLERK.

IN THE

UNITED STATES

Supreme Court of Appeals.

—o—

OCTOBER TERM, 1893.

—o—

JOSEPH S. BROWN, DEFT. AND APPELLANT,

ads.

W. N. CHANCELLOR,
B. D. SPILLMAN, } PLFFS. AND APPELLEES.

—o—

BRIEF OF

THOS. I. STEALEY,

Counsel for Appellant.

IN THE

SUPREME COURT OF APPEALS

OF THE

UNITED STATES.

—o—

OCTOBER TERM, 1893.

—o—

JOSEPH S. BROWN,	APPELLANT.
vs.	
B. D. SPILLMAN, and W. N. CHANCELLOR,	APPELLEES.

—o—

John F. Taylor owned a tract of forty-four acres of land in Pleasants county, West Virginia, which by deed dated July 29, 1889, he leased to Joseph S. Brown for the purpose of boring oil wells thereon. This lease was duly recorded in the office of the clerk of the County Court of said county on the 29th day of July, 1889. (See copy of deed filled as exhibit "B" with original bill, page 6 of record) Subsequent to the recordation of said deed, said Taylor by deed dated on the 30th day of June, 1890, conveyed the fee simple in said tract of land to plaintiffs, Spillman and Chancellor, and they are purchasers with notice of the lease and are affected by all the covenants running with the land contained in said lease.

Plaintiffs allege in their bill that the lease to Brown only covers thirty of the forty acres embraced in their deed —exhibit "A;" page 4 of record, that ten acres (part of the forty) was free from the incumbrance of the lease and was

so held by the grantor, Taylor, at the date of the last deed to plaintiffs, and that said ten acres are chiefly valuable to them for the oil and gas underlying the same. The bill also alleges that plaintiffs are in possession of said ten acres and that defendant, Joseph S. Brown, has set up and asserted some claim or pretended right under the deed of lease, which casts a cloud upon plaintiffs' title to said ten acres, and which their bill is filed to remove, in order that plaintiffs may enjoy and control the use of said ten acres under their title thereto, which use and enjoyment it is alleged the defendant threatens to interfere with.

The bill also alleges that defendant sets up a claim based upon the terms of said lease, to the exclusive right to bore for oil and gas on said ten acres, and that plaintiffs being in possession thereof have commenced to operate thereon for the purpose of obtaining oil and gas, and that defendant threatens to annoy plaintiffs by suits and otherwise in their operations and to disturb them in their possession of said ten acres for the purpose of so operating thereon, and prays that the cloud upon their title may be removed, and that defendants be enjoined, inhibited and restrained from bringing suits against plaintiffs for the purpose so alleged, and that they be also restrained from operating on said ten acres for oil, gas, or in any way annoying plaintiffs in the exercises of their rights of ownership to said land.

The answer of Brown denies all the material allegations of the bill and insists that plaintiffs are purchasers with notice of said lease and are subject to its terms, conditions and covenants and that the reservation of said ten acres, upon which no wells shall be bored or drilled without the consent of the lessor, Taylor, was not a limitation to the estate granted but a restriction upon the right to bore for oil upon the ten acres, and therefore is by its terms an acknowledgement of the plaintiffs' title and does not cast a cloud upon it in any respect in which plaintiffs have a right to have removed.

Defendant Brown substantially admits that he threatened to bring suit to quiet his—the defendant's—right and

title to the ten acres and to prevent plaintiffs from operating same for oil and gas, and insists that said restriction was one for the exercise of Taylor alone, to secure him and family from annoyance and damage from noxious oders and gasses arising from wells in close proximity to the dwelling of said Taylor; that having parted with the fee his right to insist upon the restriction no longer existed.

The plaintiff's reply generally to the defendants' answer.

The defendant, Brown, files a cross bill, in which he insists upon the right *now* to operate on said ten acres; that he has a right to the possession for that purpose, and that a correct legal construction of the terms of said lease do not give plaintiffs any right to bore upon said ten acres, and prays that the defendant Brown's right to the possession thereof may be decreed him, and that defendants be enjoined from boring oil or gas wells thereon.

A lease deed made "for the sole and only purpose of boring mining and excavating for petroleum or carbon oil and gas and pipingof oil and gas over *all* of that certain tract of land * * bounded as follows, to-wit: On the north by lands of Mrs. Jones and the Ohio River; south by lands of A. Smith; west by County Road; east by Mrs. Jones; containing 40 acres more or less, excepting reserved therefrom ten acres begining at the rail road and running thence to the County road, thence south with said County road to A. Smith's line, thence with said Smith's line to a line to be drawn from the rail road to meet it, upon which no well shall be drilled without consent of the party of the first part. To have and to hold said premises peaceably and quietly for the said purposes only, for, during, and until the full term of two years next ensuing the date and year above written or so long thereafter as oil and gas shall continue to be found thereon in paying quantities. The said party of the second part hereby covenants in consideration of said grant and demise to deliver unto said party of the first part the full equal one eighth part of the petroleum or carbon oil discovered, excavated, mined, pumped and raised on the premises herein leased as produced in the crude state, to be

delivered in pipe lines at the wells. This is a lease for mining privileges and the subject matter of the lease is oil or gas, with a restriction to the territory outside the ten acres upon which alone wells can be drilled without the consent first had of the lessor to drill on the ten acres but does not reserve a right in the lessor to the oil underlying the ten acres.

It was error therefore in the Court below to hold in its decree of February 10th, 1891, said ten acres setforth as reserved, did not pass to the grantee in said deed of lease.

If the terms of said lease operate as a limitation to the estate granted, and reserves the ten acres for all purposes, including the right to lay pipe lines thereon, a right of ingress and egress over the same to the thirty acres not reserved, as well as a restriction not to bore thereon, without the consent of the lessor, then the injunction should issue for plaintiffs.

But if defendant, Brown, by the terms of said lease, has a right to the possession of the ten acres, for the purpose of more perfectly operating on the thirty acres to which he is not restricted then it is submitted that defendant should not be enjoined from his right of ingress and egress, and to lay pipe lines according to the terms of said lease on or over any part of said ten acres, as well as the remainder of the tract. It is likewise submitted that if the terms of said lease do limit the right or privilege granted to bore wells, to the thirty acres, but also operates a release of the plaintiffs' right to bore on the ten acres, then the restraining order in the cross bill prayed for should be granted.

It is a general principle of law that, if the intention of the parties to any contract, can be clearly ascertained by the terms used, then courts will enforce the contracts as understood by the parties thereto. To ascertain the intention of the parties to the contract, reference may be had to all and any part thereof, and the intention ascertained therefrom. The defendant, Brown, insists that the deed of lease from John F. Taylor to him, dated July 29th, 1889, is susceptible, by its terms, of a clear and definite interpre-

tation of the agreement and intention of the parties respectively thereto. The deed clearly and unmistakably discloses the full and exact quantity of land granted thereby, as well also the precise uses to which the lessor and lessee are confined and restricted.

The terms of the granting part are: The party of the first part "hath demised and let unto the party of the second part, his heirs, executors, administrators, or assigns, for the *sole* and *only* purpose of boring, mining and excavating for petroleum, or carbon oil, and gas, over *all* of that certain tract of land, situate in Grant township, Pleasants county, and State of West Virginia, and bounded as follows: On the North by lands of Mrs. Jones and the Ohio river; South, by lands of A. Smith; West, by county road; East, by Mrs. Jones, containing 40 acres, more or less, excepting reserved therefrom ten acres: beginning at the rail road, running thence to the county road thence south with the county road to A. Smith's line, thence with said Smith's line to a line to be drawn from the railroad to meet it; upon which no wells shall be drilled without consent of the party of the first part. To have and to hold the said premises peaceably and quietly, for the purpose only. Now, what purpose *only* is here set forth. The deed says for the purpose of boring, mining and excavating for petroleum or, carbon oil, and gas, *and* piping of oil and gas over *all* that certain tract of land, etc. The restriction, it will be seen, does not apply to piping of oil and gas over *all* that certain tract, because clearly the terms of the grant embrace the entire tract of 40 acres for that purpose; but it applies to the boring of wells, restricting that purpose to the thirty acres, unless the consent of the grantor shall be had, to extend boring privileges over the ten acres. It is contended that the terms used in the granting part embrace the entire forty acres for boring privileges, restricting for immediate purpose boring without the reserved ten acres, but clearly embracing that part (10 acres) for other purpose for immediate use, incident to the full benefit of the privilege granted, of boring, piping and storage, etc., on all that tract, and ingress and egress to and from for the purpose set forth.

The restriction is confined to boring rights *only* on the ten acre tract of the forty acres; for all other purposes of the lease the lessee was in possession constructively of the ten acres as fully as of all other parts of the forty acres demised.

A wide distinction exists in the lease under consideration and those ordinarily entered into whereby lands for the purpose of farming or tilling the soil are granted or demised. Those leases in which lands for tillage are granted give an interest in the soil only, while the lease under consideration gives both an interest in the soil in the nature of an easement, and also grants all the oil and gas *underlying the entire tract of forty acres.* The sole and only purpose of the lease is to secure to the lessee the exclusive right to bore for oil and gas, and to pipe and convey the same over *all* the forty acre tract.

This privilege is an EXCLUSIVE one granted to the defendant, Brown, alone, and the deed must be construed with reference to the subject granted.

3 Washburn Real Property, 385.

The entire context of the lease shows such to have been the intention of the grantor and so understood by the lessee. The right to *all* the oil and gas underlying the entire forty acres was the sole and only purpose of the grant, including the easement and right to lay pipe lines to convey oil and gas from the well over the entire tract. A grant of forty acres with a reservation of ten acres would be void as to the reservation for uncertainty. It would, in fact, defeat the object of the lease if oil should underlay the ten acres only.

The grantor, to avoid such possible result, provided a restriction to the boring privilege as to the boundary of the ten acres within which wells for oil and gas should not be bored without further consent of the lessor and confineing the drilling of wells to the territory outside the ten acres. If the ten acre part was not embraced in the grant, could consent to bore on it apply? The right of property in the oil under the entire forty acres was the real subject granted.

and the limitation applied to drilling operation of wells.

Westmoreland, N. G. Co., v. Dewit,
130 Pa., Stat. 235.

If the lessor had intended to reserve any greater interest in the oil under territory embraced in the grant than one-eighth royalty, the terms of the lease should have so expressed. We are not left in doubt as to the intention of the parties in this respect, for they have expressly declared that the lessor is "to fully use said premises for the purpose of tillage, except such part as may be necessary for said mining purposes and a right of way to and from such places at which wells may be located, and a right to lay pipes over all the territory from the wells." This declaration as to the extent of the lessers' reserved use of the premises granted is inconsistent with plaintiffs' claim that they have a clear legal right under the title, conveyed by their deed from Taylor, to use the ten acres for the purpose of boring oil wells thereon.

The only use reserved to the lessor of any or all parts of the territory is that of farming or tillage of the soil. He claims no reserved right in the lease to bore oil wells himself on the ten acres, and the right to do so is not implied, because the expressed purposes reserved leaves no room for *implied* rights to bore wells for oil. Therefore it is insisted that in the absence of a right reserved to the lessor to bore wells on the ten acres, the right to do so does not exist by implication, and such pretense on the part of plaintiffs, under the conveyance of the fee to them, is not supported by law, or warranted by the legal construction of the terms of the least. It is insisted that to bore on the ten-acre tract by plaintiffs, is just as damaging to rights of the defendant Brown, as a well would be if bored on any other portion of the forty acres. Whatever amount of oil that should be taken by plaintiffs from the ten-acre part of the forty-acre tract will, to the extent of its value, deprive the defendant of so much of the substance granted to him.

It is insisted that the restriction does not apply to and limit the extent of territory covered by the grant. Nor is

it a reservation of any part of the territory. If it be insisted by plaintiffs' counsel that the ten acres of territory is an exception of so much of that which is granted, then we say that such exception is repugnant to the object of the grant, and such exception is void for such repugnancy.

Section 156, page 112, Taylor's Landlord and Tenant.

Moreover, the expressed terms used in the lease, that the lessor "shall fully use the premises for tillage," negatives the claim that he had excepted or reserved any part for other purposes.

If any part of the estate granted is to remain under the control of the lessor for other purposes he should have expressly reserve that right in the lease.

Section 159, page 113, Taylor's Landlord and Tenant.

If there is a reasonable doubt as to the meaning of the exception or reservation, the words of the exception, being the words of the lessor, are to be construed favorably to the lessee.

Section 158, page 114, Taylor's Landlord and Tenant.

It is further insisted that if there is any doubt as to the intention of the lessor, whether he has reserved the right to bore on the ten acres, then that uncertainty and doubt should be held in favor of the lessee.

Idem

Again, it is insisted that oil and gas, land, constitute the real objects to which the lessee has a right of possession, and whether the terms used in the lease shall be construed as terms of reservation, exception or restriction depends upon what is the real purpose of the grant.

If the use and occupancy of the land for the purposes of tilling or laying pipe lines to and from wells drilled on the lease can be the only object of the grant, then it would be supererogation to go further in discussing the subject. But that construction of the terms of the lease is at once met

with the words of the grant: "for the SOLE and ONLY purpose of boring, excavating, &c., for petroleum, or carbon oil and gas, *over all* that certain tract of land * * *," thus showing that oil and gas are the real objects to be used and possessed by the lessee.

An exception applies to and retains in the grantor, a part or parcel of that which he grants. An exception must be a part of the thing included in the grant.

Washburn Real Property, page 432, Vol. 3.

A reservation is of something new or not in *esse* in substance at the making of the grant.

Oil and gas are in *esse* in substance, at the making of the grant, and they are also *the* real subject of the grant. There is only an easement over all the the forty acres to a well or wells bored on any part of it without the ten acres. The lessee has a right to a way over and within the ten acres. For all other purposes the lessor held possession of all the land embraced in the deed of lease. There was not any exception of a part of the oil that might be discovered. All that was excepted to the lessor was the full use of the premises for the purpose of tillage. There was no reservation of any part of something new or not found, except the one-eighth royalty of all oils, mined or excavated. That is the reservation, if any can be said to have been made in the granting part of the lease.

Leases such as the one under consideration are very generally used in Pennsylvania oil regions. One containing in subtance the same condition as the lease under consideration was the subject of judical interpretation and construction by the Supreme Court of Appeals of Pennsylvania. In the case of the Westmoreland N. G. Co. vs. Dewitt, decided in November, 1889, a lease with similar conditions was the subject of a closely contested legal dispute. In that case there was a grant of "all that certain tract of land * * *. No wells to be drilled within three hundred yards of the brick or stone building belonging to J. H. Brown."

Westmoreland N. G. Co., vs. Dewit,
130 Pa. Stat. page 235.

The lessor here released that part within the prohibited distance, and a well was drilled thereon. The original lessee had filed his bill for an injunction, which, upon hearing in the lower court, was dismissed. An appeal was taken to the Supreme Court of Appeals, and that Court decided that the clause in question, "no wells to be drilled within three hundred yards of the brick or stone house of J. H. Brown," was neither an exception nor a reservation as to the land, but a limitation as to the privilege granted. That it did not in any way diminish the area of land leased, for that was the whole tract, but it restricted the operation of the lessees in puting down wells to the portions outside the prohibited distance.

For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated line is as much leased to the lessee as any other part of the tract. The terms of the grant would imply the reservation to the lessor of the possession of the soil for purposes other than those granted to the lessee and the parties have expressed what otherwise would have been implied by the provision, that the lessor "is to fully use and enjoy the premises for the purpose of tillage, except such part as shall be necessary for said operating purposes."

It is insisted that the restriction in the lease from Taylor to Brown, filed as exhibit in this cause, does not create a reservation of any part of the oil and gas, the subjects of the grant, but only limits the privilege not to bore or drill oil and gas wells on the ten acres without the consent of the lessor. The lessor could not bore on the prohibited territory, and surely no greater estate or rights than he possessed could be granted by him to the plaintiffs. The plaintiffs could not, without violating the terms of the grant, take oil from the ten acres, and as they, in effect, admit in their bill that they are doing so, they should be enjoined accordingly. If the view here expressed is correct, then the tempory injunction should be dissolved, and as the defendants are dispossessed of, to the extent of operating and laying pipe lines on the ten acres, the cross bill should be entertained, the plaintiffs therein put in posses-

sion of the ten acres for the purposes set forth in the lease, and injunction awarded against the plaintiffs, Spillman and Chancellor as prayed for.

Again attention is called to the uncertain and indefinite description of the ten acres. How is it possible to locate it when the beginning point on the railroad is not given? Is it possible to tell what particular ten acres the restriction not to bore on applies?

The lessee may locate a well at any point on the railroad within a reasonable distance from the county road and yet be within ten acres located at *will* of the lessor but not expressed in the deed.

The Court below in rendering the able opinion in the cause uses the following language:

"It is true in this cause mention after describing the Estate to be "reserved, excepted" he added the words; upon which no wells shall be drilled without the consent of the party of the first part."

It is not apparent to my mind why the grantor used this language. If he intended to exempt the ten acres from the lease of Brown then the restriction was unnecessary.

If he did not intend to exempt the ten acres from the lease but merely to restrict the lessee from boring on the ten acres upon which his dwelling house stood then it was unnecessary to carve out by specific meets and bounds, an estate which he declared excepted, reserved from the grant in the lease."

Is this not a misconception of what constituted the real subject matter contracted for in the lease? It was not an "estate" in the land described, but oil and gas and the right to bore and raise from their place to the surface and possess the same and "pipe" it from the land, to restrict the operation for these objects the ten acres were described by meets and bounds and then the words "upon which no wells should be drilled without the consent of the party of the first part," added, by which the real object of the parties was made manifest.

This is still further made more explicit by the terms, "the said party of the first part to fully use and enjoy the

said premises for the purpose of tillage except such parts as may be necessary for said mining purposes and a right of way to and from the place or places of said mining or excavating."

If an "estate" in the ten acres was "reserved, excepted, why reserve the right of "tillage" the only use, except mining, to which the soil is subject.

The parties have expressly stated by terms that leave no room for doubt, what their object was—on the part of the lessee a mining right and ingress and egress to and from the places of operating, on the part of the lessor the right of tillage of the soil; to prevent any interference therewith "all pipe lines shall be laid along the the fences or buried two feet under ground." The right to lay pipe lines over the ten acres "reserved excepted" from wells on the other portions of the tract of forty acres, to the public pipe line" is not prohibited by the Terms of the lease nor of the "exception" and to have prohibited laying pipe lines over the ten acres would have rendered the mining privilege of very little value if no other outlet for the oil could be had except by going over the ten acres.

The Court below draws a distinction between the "restriction" in the Pennsylvania case referred to and the terms used in the lease under consideration.

But is there any real difference? One describes by metes and bounds the space to which the restriction applies while the other describes a circle of three hundred yards around a brick house within which no wells should be drilled.

If ten acres are reserved, to what or to which ten acres does the restriction apply? Can it be located?

The exception is void for uncertainty.

Taylor, Landlord and Tenant, page 113, sec. 158.

The demurrer to the cross bill should be overruled. To obtain possession of the ten acres is a proper object for a cross bill

Defendant not in possession of the land when bill filed against him to remove cloud upon title to the same, may, if he show a better title than the complainant, obtain possession by cross bill.

Page 51, § 172, Foster's Federal practice.

Respectfully submitted,

THOS. I. STEALEY,
Counsel for J. S. Brown.

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JAMES H. McKENNEY,

Supreme Court of the United States.

No. ~~1865~~ 92

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Brief of JOSEPH S. BROWN, Appellant,

AGAINST

B. D. SPILMAN AND W. N. CHANCELLOR, Appellees.

Brief of John A. Hutchinson, Counsel for Appellees.

Supreme Court of the United States.

No. 389.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA:

Brief of JOSEPH S. BROWN, Appellant,

AGAINST

B. D. SPILMAN AND W. N. CHANCELLOR, Appellees.

Brief of John A. Hutchinson, Counsel for Appellees.

STATEMENT OF CASE:

This bill was filed by the appellants to restrain the defendant the appellant and his agents from taking possession of and boring for oil upon the parcel of ten acres of land in the bill mentioned. See record pages 2 and 3.

The appellees claim the benefit of an exception or reservation in a deed of lease made by John F. Taylor, which deed of lease granted to Brown a tract of thirty acres describing however the exterior boundaries of forty acres, and reserving the ten acres to the lessor. The appellees were purchasers in fee simple of the reversion as well as of the ten acres reserved. Their deed is found on pages 4 and 5 record, exhibit

"A." The lease under which the appellant claimed is found on pages 6 and 7.

The exception in the lease is "excepting and reserved therefrom (that is from the forty acres), ten acres beginning at the railroad, etc." The court granted the injunction prayed for and the appellant Brown answered the bill and filed a cross-bill to which the appellees entered a demurrer and by consent of counsel the cause was set down for hearing on the bill and exhibits, answer and replication, and on the 10th day of February, 1891, the Circuit Court filed an opinion which is found on pages 21 to 27 inclusive.

ARGUMENT.

The opinion of the Circuit Court presents the points relied upon by appellees so clearly and refers to the authorities in support of the points decided so fully, that it is unnecessary to elaborate the questions raised.

In support of the doctrine that the exceptions are reserved to the lessor under the lease the ten acres in controversy, appellees rely upon:

Shep. Touchstone 77;
Plowden 196, 561.
Dyer 59.
Perkins sec 625.
3 Wash. Real Property 5 Ed. 461.
Stockbridge Iron Co. vs. Hudson Iron Co. 107 Mass. 321.
Corning vs. Troy Iron Co. 40 New York 209.
Munn vs. Worrall 52 New York 44.
Low vs. Settle 32 W. Va. 600
Greenleaf vs. Birth 6 Peters 302.
2 Lomax Digest 214.
Roberts vs. Robertson 38 Am. Rep.
Taylor's Landlord & Tenant secs 156-157.
Maxwell Land Grant Company vs. Dawson 151 U. S. 586.

The brief of counsel for appellant admits substantially that the exception is as claimed by the appellees, but undertakes to avoid the effect of it by giving it a

construction according to the opinion of the Supreme Court of Pennsylvania in the case of Westmoreland &c. vs. DeWitt 130 Pa. St., 235, but in that case it was declared by the Court to be a mere limitation on the right of the lessee to drill wells within three hundred yards of a certain building. Here was a definite and distinct grant of land excepted and reserved from a large tract by metes and bounds which the courts of West Virginia have held, as cited in Lowe vs. Settle 32 W. Va. 600, amounts to an exception which excluded the parcel described from the grant.

It is respectfully submitted that the decree is right and should be affirmed.

JNO. A. HUTCHINSON,
of Counsel for Appellees.